No. 12562

IN THE

United States Court of Appeals

For the Ninth Circuit

LIBBY, MCNEILL & LIBBY,
a corporation,
Appellant,

vs.

ALASKA INDUSTRIAL BOARD and
PETER LATHOURAKIS,
Appellees,

Upon Appeal from the District Court for the
Territory of Alaska, First Division

BRIEF FOR APPELLEES

J. GERALD WILLIAMS and
JOHN DIMOND
for Alaska Industrial Board.

ROY E. JACKSON and
HENRY RODEN,
for Appellant Lathourakis.

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BRIEF FOR APPELLEES

STATEMENT OF FACTS.

Since appellant's brief does not include all the facts which appellees consider relevant, a brief statement follows:

Prior to 1948 the Appellee Lathourakis had been a commercial fisherman for some twenty years. In the spring of 1948, after being examined by the appellant's physician in Seattle, appellant sent him to Bris-

tol Bay, Alaska, there to catch fish to be processed at its salmon cannery at Libbyville. On July 16, 1948, while engaged in fishing, he was injured in collisions between his fishing boat and a fish barge, sustaining severe injuries to his right arm and chest. After being extricated from the position in which he had been pinned, took a drink of gin and immediately vomited. He was taken to the emergency hospitals at Libbyville and Koggiung. On July 23, he was flown to Seattle for further treatment. There he was examined by a number of physicians and informed that, in their opinion, he was suffering from cancer; surgery was suggested which he declined. After remaining in the Marine Hosptal at Seattle for several weeks he went home. Upon the advice of Doctor Gray and the solicitation of members of his family he returned to the hospital and, on October 7, submitted to an operation for cancer.

The operation required the removal of a rib; the opening of the chest, collapsing of a lung and splitting of the diaphragm. No cancer was found; the position of his stomach was then changed by elevating it up to the middle third of the esophagus and the two were sewn together; the diaphragm was then sewn to the side of the stomach and the stomach itself to the vertebral column and the chest wall. No cancer being present the physicians changed their diagnosis to a conclusion that the patient was suffering from a congenital malformation of the esophagus.

From the moment of the accidental injury to the time of the hearing of his application for compen-

sation before the Alaska Industrial Board Lathourakis was unable to swallow solid food; his right arm continued numb and he was suffering other and additional disabilities as a result of the accident of which we shall speak later in this brief.

The Industrial Board awarded him temporary compensation up to May 20th, 1949, at the rate prescribed by the statute and permanent partial disability compensation equal to fifty per cent as for total-permanent disability.

On appeal from the Board's decision the District Court affirmed the award. From this affirmance this appeal is prosecuted.

On its appeal to the lower court the appellant raised the same points he relies on here for reversal. The learned District Judge found none of them well taken.

ARGUMENT

In its brief the appellant makes three points:

First: That the Alaska Industrial Board may not base its Findings upon hearsay or ex parte testimony.

Second: That under the Alaska Workmen's Compensation Act the Board cannot award for the same injury, both temporary and permanent disability compensation, and

Third: That an attorney's fee cannot be assessed against the losing party on an appeal from the Board's decision to the District Court.

We shall consider these points in the order stated.

First: Competent Evidence

We agree that the Findings of the Board must be supported by competent evidence and respectfully suggest that such evidence is in the record. In order to make out his case the injured employee is required to show that the relation of employer and employee existed at the time of the accident and that it arose out of and in the course of his employment.

Both these facts are admitted by appellant in its "Admission of Service and Answer to Application for Compensation." Tr. Pg. 11.

The employee is further required to establish the fact that as a result of the accident he sustained temporary and, if claimed, partial permanent disability.

The Industrial Board found that the employee was temporarily disabled from the time of the accident, July 16, 1948, to the 20th day of May 1949.

This Finding is supported by the following evidence:

> "Before the accident I weighed 190 pounds; now, on May 26, 1949, I weigh 156. I cannot gain weight because I cannot eat much solid food and I can't sleep well. I can eat hamburgers and fish. I cannot eat ordinary food because I can't get them down; sometimes I throw whole thing up. I have to take medicine before meals and have to eat 5 or 6 times a day. I can only walk two or three blocks on the level and only one block on the hill. My right arm is numb; it pains when I do a little work around (my) boat on doctor's orders. I have very little grip in the right hand now and two fingers are numb"; Tr. pg. 27; "I

vomited last time two weeks ago;" Tr. pg. 29; "cannot eat things like beefsteak, pork chops or the like; I still feel pretty weak." Tr. pg. 33.

To show that the temporary disability continued beyond the time fixed therefor by the Board, we refer to the testimony of Doctor McGowan, a witness for Appellant who testified, on July 6, 1949, when his deposition was taken as follows:

Q. How much was he disabled when you saw him last?

A. I have not seen him for a month so I cannot tell.

Q. But you would assume it would be more than twenty or thirty per cent?

A. Yes.

Q. Around thirty to forty?

A. I would assume it be around forty per cent. Tr. pg. 81.

Again, on re-direct examination by appellant's counsel, he testified:

Q. When Lathourakis has completely convalesced, if he had not when you saw him, would you give any opinion as to any permanent disability which would remain in him?

A. Yes, sir, I think he will have a definite partial disability.

Q. In terms of a man being able to work, could you give us any percentage?

A. I would rate Mr. Lathourakis at the present time, or, excuse me, at the time of his complete convalescence as being between twenty to thirty per cent disabled. Tr. pg. 80, 81.

Permanent Partial Disability

The evidence shows conclusively that as a strong and active man Lathourakis started fishing for the Appellant when the 1948 season opened in Bristol Bay. On July 16, seeing that a collision between his fishing boat and a near-by barge was inevitable he jumped from the bow of his boat into the forecastle and, to avoid drowning, he clung to the mast with his right arm around it; his boat hit the barge at a speed of 25 miles per hour. The topside of the barge hit his head, arm and chest. He then dropped into the forecastle. Tr. pg. 22.

He took a little drink of gin "which we keep on the boat for cold weather and right away vomited." Tr. pg. 23. "My arm and chest were black and blue and numb." Was taken to hospital and cleaned up as "I was all bloody." After five days at the local hospital he was flown to Seattle for further medical attention. His wife was advised that it was the concensus of opinion of several physicians that he was suffering from carcinoma, the medical term for cancer, and that without immediate surgery he would die. Tr. pg. 24, 102.

The operation for "cancer" was performed on October 11, 1948; no carcinoma was found and the expert physicians found their diagnosis to have been wrong.

They did find that the walls of his esophagus were abnormally thick and that this condition was congenital.

> "Before the accident I was strong enough for two men." Tr. pg. 26; "I was high boat in 1946 and 1947 in Bristol Bay; I have the best boat on Puget Sound; I could easily earn from five to eight thousand dollars a year;" Tr. pg. 31; "Before the accident I had no trouble about eating." Tr. pg. 31;
>
> "I never consulted a doctor in my life except for physical examination." Tr. pg. 33; "I am unable to walk more than two or three blocks on the level and but one on the hill; have only little grip in the right hand and two fingers are numb; my breathing is not very good; cannot do one third as much work as I did before the accident." Tr. pg. 27; and "don't think even a good friend would hire me in the condition I'm in. I got no strength—no nothing." Tr. pg. 27;
>
> Suffers from shortness of breath; Deposition of Doctor McGowan, Tr. pg. 79.

This evidence is corroborated by that of Fred Sheils, who testified:

> "I have known him since 1943, during which time he engaged in fishing; he was high boat man and was always very active; his physical condition was very good; he was a strong powerful man; he fished for me in 1949; we lived on the same ship; he was not the same man he was a a year ago; he got tired after doing very little work; he could not do his share of the work and I had one of the deck hands help him as he could not lift his arms high enough to do it. He was supposed to do that kind of work himself. He was not able to do equal work with his partner;

his partner had to do two-thirds of all the work. From the work he was able to do this year it's hard to say whether I would employ him again next year; I took him this year because he was a good friend of mine; I don't think he would get the same consideration from someone else. I didn't let him work after the season as fishermen are supposed to do to earn their run money. He was all in so I told him to take it easy." Tr. pg. 33 et seq.

In addition to the foregoing testimony it is proper to call the Court's attention to the fact that the injured employee appeared before the Industrial Board in person. The Board had an opportunity to consider the appearance and demeanor of the claimant and of his seeming health and ability to work. The inspection of a witness is often an important factor in the weight to be given to his statements and such observation as constitutes additional evidence upon which a Finding may be predicated and justifies a Finding as to the nature of an injury even though the Record may be otherwise bare as to that phase.

We take the liberty of suggesting here that the Alaska Industrial Board, which understands local conditions and on account of its constant contact with fishermen in this Territory, must be credited with having knowledge as to what is required of them in the performance of their work and where one such man is partially disabled for work can state what amount he would or could be earning, taking into consideration the nature of his injuries.

The appellant's physician, Doctor Gray, on page 103 and 104, of the Transcript expresses the view that the

employee's condition may be due to the accident. He states:

> Q. I would like to ask you to assume that the fright, the regurgitation, the numbness that he felt in his chest down his stomach, and then the lack of ability to swallow, if it is not reasonable to assume that all these symptons that followed this accident, up to the time of the operation, are the result of this accident?
>
> A. If the symptoms are due to spasm alone, then I feel that it is reasonable to assume with that definite history that this symptom of difficulty of swallowing is due to the injury, but from my knowledge of what has transpired and what the findings were, I feel that he had a preexisting condition; so I cannot lay *all* the symptoms due to the injury, and this spasm could follow fright and an injury to the chest, such as he had, under the conditions that he had."

And, testifying as to possible aggravation of a preexisting abnormal esophagus, the same physician testified:

> Q. Could the spasm of the esophagus, together with the regurgitation that followed aggravate an organic lesion in the esophagus?
>
> A. It could. Tr. pg. 108.

We have here a frank statement by appellant's physician that in his opinion he does not feel that he can ascribe the employee's incapacity as being due wholly to the accident; but that it contributed thereto by aggravating a prediseased condition and that the combination of the two resulted in the incapacity.

Anchor Casualty Co. vs. Wolf, 181 Fed. (2) 741.

Bearing in mind the proofs concerning his good health, that he had never needed advice of a physician, had worked hard year in and year out, had no complaint of any kind up to the moment of the accident yet from that moment on he has been seriously disabled, can it be denied that he has established, by a preponderance of the probabilities according to the experience of mankind, that there was causal connection between the accident and his subsequent condition?

Dobin vs. Crucible Steel Co., 51 At. (2) 434.

The record does not show any previous illness due to the condition of his esophagus or treatment therefor; if it was malformed it had never prevented him from going about his daily tasks for many long years, without interruption and undisturbed thereby. One day he has a violent collision from which he suffers great pain and injuries in and to his body and limbs; from this the deduction is forced upon an unprejudiced mind that the shock and effect of the collision was responsible for the resultant condition.

Reasonable probability, not absolute certainty is sufficient.

Pacific Employers vs. Ind. Board, 122 Pac. (2) 570.

Appellant's physicians claim the malformation of his esophagus is congenital—if so it did not prevent him from being a useful soldier in the First World War. Tr. pg. 32.

What is there to indicate that his present condition is due to the malformation of his esophagus? Nothing.

The experts, at one time, expressed the opinion the man was suffering from cancer. Had he died they would have certified, under their hand and seal, that in their opinion cancer to be the cause of his death and the claimant would have been buried as well as their mistake.

It will hardly be claimed that the condition of his esophagus caused the regurgitations right after the accident; that it made his arm and chest black and blue; that it made him to become covered with blood; that it caused his instability, lack of stamina and grip in his right arm, and that he is no longer as "strong as two men and can only do about one third of the work he was able to perform before the accident."

> "Where there is such close connection between the accident and injury so as to satisfy a reasonable person as to the cause of the injury, the relation between the two is sufficiently shown; the sequence of events strongly indicates the causal connection between the entirely unexpected injury and the continued disability following it."

Saylor vs. Greenville Car Co., 43 At. (2) 633.

The modern concept is that it is enough if the preponderance of probabilities according to the experience of mankind point to causal relation.

The argument as to whom to believe may be urged before the Industrial Board but has no place on appeal.

It was for the Board to say what testimony it would believe or reject.

> "The claimant testified he had not recovered; the doctor said he had." The award was sustained; the Board could disbelieve the doctor.
>
> *Florence Citrus vs. Parrish*, 36 So. (2) 369.

> Even though the only doctor who testified stated there was no causal connection, an award may stand as the doctor may be disbelieved, and causal connection be inferred from the rest of the evidence.
>
> *Wallace vs. Hogue, et al.*, 185 Pac. (2) 711; quoted in 201 Pac. (2) 106.

We respectfully suggest that the evidence, thus far referred to is amply sufficient to justify the trial court's conclusion that the Findings of the Board were supported by competent evidence. Proof of the causal connection between the accident and the resulting incapacity is fully established, not only by reasonable inferences which may fairly be drawn from the evidence but by direct proof.

> "Applicant's evidence as to his condition has probative value. While he cannot make prognosis he can state facts as to his condition and these may be of such a nature as to enable the Board to determine the extent and duration of his inability even in the absence of medical evidence."
>
> *Yocum Creek Coal Co. vs. Jones*, 214 S.W. (2) 410.

> "Testimony of injured person may be believed in preference to the opinion of a whole college of physicians."
>
> *Atlantic Steel Co. vs. McLarty*, 39 S.E. (2) 733.

We believe that the evidence of the claimant himself and of his witness Sheils with the fair and reasonable inferences that may be drawn from it, fairly shows that the accident was the cause of the incapacity; add to this the testimony of appellant's Doctor Gray that the accident, though not wholly responsible for it in his opinion aggravated a pre-existing condition and that the two together brought about the incapacity of the claimant, and we have an unassailable case.

In addition to the testimony thus far dealt with, the employee introduced in evidence the statements of two physicians who examined him, Doctors Williams and Slyfield.

In his statement under date of March 23, 1949, Doctor Williams says: (Tr. pg. 117) After setting forth the complaints made by the patient, which are the same as those made by him to appellant's physicians and to the Industrial Board at the time of the hearing, the doctor states:

> "Examination shows that he has lost 45 pounds since the operation and has regained about 20 pounds in the past two months. There is limitation of motion of the left rib cage, and under the fluoroscope the left diaphragm is elevated and the lower lobe of the lung appears partly collapsed.
>
> "Grip in the right hand is decreased to approximately 40% of that in the left hand. The numbness of the fingers of which he complains can be explained by medial and radial nerve damage in the forearm.

"The man in his actions and appearance gives an impression of general weakness. This has been produced by the effects of the accidental injuries and by the strain and shock of the operation.

"In my opinion the history of the accident and the man's history, together with the ex-ray and pathological evidence and the findings at operation, indicate convincingly that the accident was the responsible cause for the esophageal injury probably by bruisng of the esophagus by the mediastinal contents as a result of the impact. He has suffered permanent disability as a result of the injuries sustained in his accident of July 16, 1948. The disability resulting from the chest injury and subsequent necessary surgical work is estimated at 65% of the maximum for unspecified permanent partial disability, and that of the major forearm at 20% of the amputation value of the major upper extremity at the elbow. It is expected that some strength of grip will be regained in the forearm with increased use and that some improvement of the present state of general weakness will ensue. This is taken into consideration in the above ratings. Otherwise I feel his condition is fixed at this time. The man has been totally disabled for work since the date of injury and is still disabled for any but the lightest kind of work."

Doctor Slyfield, after repeating the history given him by the claimant, which is the same as appears throughout the case, states: Tr. pg. 115:

"From my study as to the cause of this misfortune many etiological features might be conjectured. One cannot avoid being seriously influenced by the history. Lathourakis had no complaints up to the moment of the accident, yet immediately after it the train of symptoms arose which clearly led to the disaster on which claimant bases his complaint. I do not assert profic-

iency in disturbances of the esophagus, but the story, the findings at the operation, the pathological report and the present condition are, to me, convincing evidence that the accident was responsible for the chain of events."

The appellant claims these statements should not have been considered by the Board.

The Alaska Workmen's Compensation Act, section 43-3-13, Alaska Compiled Laws, 1949, reads:

> "The Industrial Board may make rules not inconsistent with this Act for carrying out the provisions hereof."

Pursuant to this authority, the Industrial Board, among others, adopted its Rule Number 13, which reads:

> "The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence. Hearsay evidence shall be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient of itself to support a finding." Article 9(c), of the Rules adopted by the Industrial Board reads:
>
> "The Board favors the production of medical evidence in the form of written reports. These reports should include:
>
> 1. History of the injury;
> 2. Source of all facts set forth in the history and complaints;
> 3. Findings on examination;

4. The patient's complaint;
5. Opinion as to the extent of disability and working ability;
6. Cause of the disability;
7. Medical treatment indicated;
8. Likelihood of permanent disability;
9. If permanent disability exists whether it is ready for rating;
10. The reasons for opinions."

"Article 9(d). Upon the filing with the Board an application or other pleading, all parties must immediately, or in any event, within five days after service of such pleading, send to the Board the original signed reports of all physicians relating to the proceedings which they may have in their possession or under their control. Copies shall be served forthwith on the adverse party.

"Article 9(e). All physicians' reports acquired by any of the parties during the pendency of the particular phase of the proceeding shall immediately, or in any event within five days of receipt, be sent to the Board and copies served on the adverse party.

"Article 9(h). If a party fails or refuses to comply with the foregoing provisions the Board may decline to receive in evidence any physician's report or other written testimony from a physician whose report has not been so filed. It shall be presumed that the report of evidence withheld in violation of said sections was wilfully suppressed and would be adverse if produced."

The statute just quoted deals with procedure only and not with any substantive rights and pursuant to it, the Board has authority to prescribe fair and reasonable rules and methods to be followed in proceed-

ings pending before it. The reports of the two physicians were presented in accordance with these rules and the Board had the right to consider or reject them.

Under the common law of procedure substantative rights are governed by procedure; but this has been changed by the enactment of workmen's compensation acts; under them substantive rights control procedure and common law principles are not applicable.

> The reports by the doctors, required as aforesaid, become part of the Board's file and constitute a part of the record and may be considered by the Board though the sources of information on which they are based and the manner in which they become part of the file might affect their weight as evidence, they are nevertheless competent and admissible to be considered for what they are worth.
>
> *Devlin vs. Department of Labor* 78 Pac. (2) 952.
>
> "The manner in which they get into the record may affect their weight as evidence but, in our opinion, are not incompetent and may be considered by the Board for what they are worth."
>
> *McKinzie vs. Department of Labor*, 37 Pac. (2) 218.

We respectfully repeat, that the record supports the Findings of the Board as found by the District Court.

The situation here is fully covered by the opinion of this Honorable Court in:

Contractors vs. Pillsbury, 150 Fed. (2) at page 312 where the Court, speaking by Honorable Circuit Judge Bone says:

> "There was evidence covering material facts before the Commissioner which would support the order of award. Logical deductions and inferences which may be and are drawn by him from the evidence should be taken as established facts and are not judicially reviewable. Even if the evidence permits conflicting inferences the inference drawn by the Commissioner is not subject to review and will not be re-weighed. The Commissioner is not bound to accept the opinion or theory of any particular medical expert but he may rely upon his own observation and judgment in conjunction with all of the evidence before him."

We repeat that we do not contend that hearsay testimony alone is sufficient to support a material Finding of the Board; but the Board may consider it when it is sustained by other competent evidence.

Appellant, in its Brief, cites a number of authorities holding that hearsay evidence alone is not sufficient to establish the essential facts of an accidental injury, such as:

> *Lallier Construction Co. vs. Industrial Com*mission, 172 Pac. (2) 534, and others among them:
>
> *Employers etc. vs. Industrial A. C.*, 151 Pac. 423.

It will be noted that the holding in all these cases is that "hearsay evidence alone" is not sufficient, plainly indicating that, to a degree, it is admissible under the Workmen's Compensation Acts and will be

given such weight as the hearing authority may deem it entitled to.

Point Two

Under Alaska Workmen's Compensation Act, Board can award temporary and permanent disability arising out of same injury.

The subsection of §43-3-1 of the Alaska Workmen's Compensation Act, dealing with the compensation for injuries causing temporary disability, reads as follows:

> "For all injuries causing temporary disability, the employer shall pay the employee, during the period of disability, sixty-five per cent of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule ,relating to cases other than temporary disability, the amount so paid shall be in addition to the amount to which he shall be entitled under such provision in this schedule."

The foregoing is followed by a provision dealing with the amount payable to an employee who is either partially or totally permanently disabled.

For argument upon this point we confine ourselves to repeating the opinion of the able District Judge of the First Division of Alaska, who says in his opinion in this case, at pg. 122, of the Transcript: "The remaining contention: "That allowance for temporary and permanent disability may not be cumulated, is based upon an analysis and reconstruction of the Workmen's Compensation Statute. Section 431-1-39

ACLA 1949, which, though plausible, appears to rest largely upon conjecture and speculation as to legislative intent. It may be granted that the language of the Act is somewhat inept, ambiguous and inconsistent and that it encourages malingering for the purpose of prolonging temporary disability payments, but in my opinion it is not reasonably susceptible of the construction urged by plaintiff, and in any event, doubts must be resolevd in favor of the employee."

Point Three

Recovery of Attorney's Fee on Appeal.

The applicable provisions of the Alaska Workmen's Compensation Act read:

Section 43-3-17 ACL 1949:

> "In all proceedings before the Industrial Board or in any court under this Act the costs shall be awarded and taxed as provided by law in ordinary civil actions in the District Court."

Costs in ordinary civil suits are governed by Section 55-11-51:

> "The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney's fees in maintaining the action or defense thereto, which allowances are termed costs."

The court in Alaska has consistently allowed attorney fees as costs to the prevailing party, generally.

Pilgrim vs. Grant, 9 Alaska Reports 417.

And this Court has allowed attorney fees as costs.

Forno vs. Coyle, 75 Fed. (2) 692.

The District Court for the First Division of Alaska, has uniformly allowed attorney's fees as costs in appeals coming before it from the Industrial Board, viz:

J. H. Scott, vs. Alaska Industrial Board and Edward Erickson, decided June 10, 1950.

In conclusion we desire to repeat, what the Supreme Court of the United States, has stated in:

Tenant vs. Peoria Ry. Co., 321, 29, at pg. 35.

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury, on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal points of judicial review is the reasonableness of the particular inferences or conclusions drawn by the jury. It is the jury, not the court, which is the fact finding body."

In the case at bar the Industrial Board was the fact finding body; its findings were supported by the finding of the District Court. We respectfully urge that the judgment of the District Court be sustained.

Respectfully submitted,

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for Appellee Alaska Industrial Board

and R. E. JACKSON and HENRY RODEN
for Appellee Lathourakis